

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 05 February 2007**In the Matter of

**B.D.V.**

Claimant

Case No. 2006-BLA-05071

v.

**C.P.G. INC.**

Employer

and

**DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS**

Party-in-Interest

**APPEARANCES:**

Jeffrey Hinkle, Esquire

Claimant

Francesca Maggard, Esquire

For the Employer

Christian Barber, Esquire

For Department of Labor

**BEFORE:**

DANIEL F. SOLOMON

Administrative Law Judge

**DECISION AND ORDER**

***DENIAL OF CLAIM***

This proceeding arises from a request for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* In accordance with the Act and the pertinent regulations, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing requested by the Claimant on August 11, 2005. Director's Exhibit ("DX") 26.

Claimant was last employed in coal mine work in the state of Kentucky, the law of the United States Court of Appeals for the Sixth Circuit controls. See ***Shupe v. Director, OWCP***, 12 BLR 1-200, 1-202 (1989)(en banc). Since Claimant filed this application for benefits after January 1, 1982, Part 718 applies.

An initial claim was filed August 5, 2004. DX 2. Benefits were denied by the District Director by a Proposed Decision and Order dated July 14, 2005. DX 25. This appeal by the Claimant followed.

30 Director's Exhibits (DX 1-DX 30) were admitted into the record for identification. See transcript, "TR" 5-6. Two Claimant's exhibits "CX" 1- CX 2 (TR 7) were admitted into evidence as were two Employer's exhibits ("EX" 1 – EX 2). Post hearing the record remained open for briefs. The Employer and Director filed briefs, but the Claimant did not.

Claimant testified that he has a 12th grade education. His last date of exposure was February 4, 1995. He stated that his employment was underground work doing various jobs. He worked for his father, who owned an underground mine for seven years, and also worked for several small mines during the period, 1979-1987. TR 8-9, 12-14. He also worked outside or above ground for CPG, Inc. until it stopped hauling coal. After he left CPG, Inc., he worked for Dags Branch for a little under one year. From 1995 to 2000, he was employed outside of the coal mining industry. He returned to the mining industry in 2001 with McCoy Elkhorn where he worked from June, 2001 through March 2, 2002. He left McCoy Elkhorn due to a shutdown. He was called back, but was unable to pass a physical. He testified that his last year of coal mining employment of a year's duration was at CPG, Inc, where he worked 7 years. TR 16. He stated that although he worked for Johns Creek Elkhorn and McCoy Elkhorn, he had no idea regarding the relationship of these companies. In addition, he stated that CPU, Inc. and Dags Branch had a single owner. TR 8-10.

At CPG, Claimant ran a shuttle car, a scoop, and was a roof bolter.

The Claimant maintains that he has shortness of breath and hyperventilation. He has gained weight and has leg trouble. Sleep is impossible. He uses three pillows. He has troubles with stairs and walking up inclines. He also coughs up coal dust. His breathing is worse since he left the coal mining industry. He uses Advair as prescribed by Dr. Robert Parker. He is also taking breathing treatments. He stated that he could not return to work due to his lung problems. He also has no energy and is unable to do household chores such as mowing the lawn.

#### APPLICABLE STANDARDS

Because the Claimant filed this application for benefits after March 31, 1980, the regulations set forth at part 718 apply. *Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 204, 12 B.L.R. 2-376 (6<sup>th</sup> Cir. 1989).

This case represents an initial claim for benefits. To receive black lung disability benefits under the Act, a miner must prove that (1) he suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) he is totally disabled, and (4) his total disability is caused by pneumoconiosis. *Gee v. W.G. Moore and Sons*, 9 B.L.R. 1-4 (1986) (en banc); *Baumgartner v. Director*, OWCP, 9 B.L.R. 1-65 (1986) (en banc). *See Mullins Coal Co., Inc. of Virginia v. Director*, OWCP, 484 U.S. 135, 141, 11 B.L.R. 2-1 (1987). The failure to prove any requisite element precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111 (1989); *Perry v. Director*, OWCP, 9 B.L.R. 1-1 (1986) 1-1 (1986) (en banc).

#### STIPULATIONS AND WITHDRAWAL OF ISSUES

1. The timeliness of the claim is no longer being contested. TR 10.

Timeliness is a jurisdictional matter that can not be waived. 30 U.S.C. § 932(f), provides that "[a]ny claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later": (1) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978. The Secretary of Labor's implementing regulations at 20

C.F.R. § 725.308 sets forth in part, as follows:

(a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Act of 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.

(c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, except as provided in paragraph (b) of this section, the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

I have reviewed all of the evidence in the record and no evidence exists to rebut the presumption.

2. The Claimant is a “miner” who performed cm1 after 1969. DX 28.
3. Both the Director and the Employer accept that the record establishes at least 15 and one half years of coal mine employment.
4. The Claimant has one dependant for augmentation. DX 28.

#### REMAINING ISSUES

1. Whether the miner suffers from pneumoconiosis.
2. If so, whether the miner’s pneumoconiosis arose out of coal mine employment.
3. Whether the miner is totally disabled.
4. If so, whether the miner’s disability is due to pneumoconiosis.
5. Whether the Employer is a “responsible operator” under the Act.

#### BURDEN OF PROOF

“Burden of proof,” as used in this setting and under the Administrative Procedure Act<sup>1</sup> is that “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” “Burden of proof” means burden of persuasion, not merely burden of production. 5 U.S.C. § 556(d).<sup>2</sup> The drafters of the APA used the term “burden of proof” to mean the burden of persuasion. *Director, OWCP, Department of labor v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 B.L.R. 2A-1 (1994).<sup>3</sup>

A Claimant has the general burden of establishing entitlement and the initial burden of going forward with the evidence. The obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production; the obligation to come forward with evidence to support a claim. Therefore, the Claimant cannot rely on the Director to gather evidence. The Claimant bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985).

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<sup>1</sup> 33 U.S.C. § 919(d) (“[N]otwithstanding any other provisions of this chapter, ant hearing held under this chapter shall be conducted in accordance with [the APA]; 5 U.S.C. § 554(c)(2). Longshore and Harbors Workers’ Compensation Act (“LHWCA”) 33 U.S.C. § 901-950, is incorporated by reference into Part C of the Black Lung Act pursuant to 30 U.S.C. § 932(a).

<sup>2</sup> The Tenth and Eleventh Circuits held that the burden of persuasion is greater than the burden of production, *Alabama By-Products Corp. v. Killingsworth*, 733 F.2d 1511, 6 B.L.R. 2-59 (11<sup>th</sup> Cir. 1984); *Kaiser Steel Corp. v. Director, OWCP [Sainz]*, 748 F.2d 1426, 7 B.L.R. 2-84 (10<sup>th</sup> Cir. 1984). These cases arose in the context where an interim presumption is triggered, and the burden of proof shifted from a Claimant to an employer/carrier.

<sup>3</sup> Also known as the risk of non-persuasion, see 9 J. Wigmore, Evidence § 2486 (J. Chadbourn rev. 1981).

### **Responsible Operator**

Employer contests this issue, TR 29-30, however it is not briefed.

The Director directs me to the miner's OWCP employment history form and his social security earnings record report a history of employment with C.P.G. from 1987 until 1994 (DX 3, 6). The miner signed a form indicating that he worked for C.P.G. from January 1987 until February 1994, and that the mine "might have been Carbon Black Coal Company" until October 1987 (DX 18). C.P.G. was owned by Charles and Linton Griffith; the miner worked for C.P.G. at a mine known as "Carbon Black #1"; the mine was "very dusty;" and the miner did not work at that mine for any other company (Id.). In addition, the miner testified at the formal hearing that he worked for C.P.G. for about seven years, from 1987 until "around March of '94" (TR 13-14). He further testified that he worked about half that time underground and half outside, and that he was exposed to coal mine dust the entire time (TR 14-15). The last coal mine at which the miner worked for more than one year was the C.P.G. mine (TR 16). He stopped working for C.P.G. because the mine "mined out" (TR 14). James Litton Griffith and Chuck Griffith were the owners of C.P.G. (TR 20). C.P.G. is capable of assuming liability for the payment of continuing benefits (DX 15, 19).

I am also directed to the following:

After working for C.P.G., the miner worked for Dags Branch in 1994 and 1995 (DX 3, 6). The miner signed a form indicating that he worked for Dags Branch for "pretty close" to one year (DX 14). Dags Branch was owned by Chuck Griffith, Linton Griffith, and Danny Justice; the miner worked for Dags Branch at a mine known as "Mine #1"; and the miner did not work at that mine for any other company (DX 14). He also stated that "CPG Inc I think was owned at some point by the owners of Dags Branch" (DX 14; see also DX 18 ("I think CPG & Dags Branch were owned by the same people"))).

C.P.G. deposed the miner on December 6, 2004 (DX 5). The miner testified that he worked for Dags Branch a few weeks less than one year (DX 5, p. 7). He testified that James Linton Griffith and Chuck Griffith owned C.P.G., and that they and Danny Justice owned Dags Branch (DX 5, pp. 7-8). The two companies had the same secretaries and their offices were at the same place, but the miner did not have the same coworkers at C.P.G. and Dags Branch (DX 5, p. 8). The C.P.G. mine was "mined out" in February 1994, and some miners were transferred to "Scamps Branch" and some to Dags Branch (DX 5, p. 9). Dags Branch did not have the same equipment as C.P.G., and the miner did not consider them to be the same company (DX 5, p. 9).

At the hearing, the miner again testified that he worked for Dags Branch less than one year, from March 1994 until February 1995 (TR 15). James Litton Griffith, Chuck Griffith, and Danny Justice owned Dags Branch (TR 21). "Then there was a split and Chuck Griffith took Scant Branch and Litton and Danny wound up with Dag's Branch. That's where I was transferred to" (TR 21). Danny Justice had not been an owner of C.P.G. (TR 21). Dags Branch was not the same mine as C.P.G. (TR 22, 27). Some C.P.G. employees were transferred to Dags Branch and some to Scant Branch (TR 22). Dags Branch used some but not all of the equipment that was used at C.P.G. (TR 24).

The record shows that McCoy-Elkhorn Coal Corporation wage records submitted to the Kentucky Department of Workers' Claims indicate that the miner worked for that company from June 20, 2001, until March 2, 2002 (DX 7, 13). The miner signed a form indicating that he had worked less than one year for McCoy-Elkhorn, but stating that "I think McCoy-Elkhorn purchased Johns Creek Elkhorn Coal whom I worked for from 1/72 through August of 1973"

(DX 13). The miner signed a Kentucky Department of Workers' Claims employment history form in 1996 indicating that he had worked for Johns Creek Elkhorn Coal from June 1972 until December 1973 (DX 14).

When C.P.G. deposed the miner, he testified that he worked for McCoy-Elkhorn from June 2001 until March 2, 2002 (DX 5, p.5). When asked whether McCoy-Elkhorn was related to any other companies he had worked for, the miner replied, "I believe in 1972 up to '73 I worked for Johns Creek Elkhorn. At that time they were not one and the same, but McCoy bought out Johns Creek Elkhorn after that" (DX 5, p. 16).

He indicated that McCoy-Elkhorn bought out Johns Creek Elkhorn after he had worked for Johns Creek but before he worked for McCoy-Elkhorn (DX 5, p. 17). He then added that when he worked for McCoy-Elkhorn it was actually owned by James River Coal Company.

The Director argues that C.P.G. meets all the conditions required to be a potentially liable operator under § 725.494. The miner was exposed to coal mine dust during his C.P.G. employment; consequently, his alleged disability due to pneumoconiosis arose, at least in part, out of his C.P.G. employment (DX 18; TR 14-15). 20 C.F.R. § 725.494(a). The miner worked at C.P.G.'s mine from 1987 until 1994; thus: (1)C.P.G. was an operator after June 30, 1973; (2) the miner was employed by C.P.G. for more than one year; and (3)the miner's C.P.G. employment included at least one day after December 31, 1969 (DX 3, 6, 18; TR 13-14, 16). 20 C.F.R. § 725.494(b)-(d). Finally, C.P.G. is capable of assuming liability for the payment of continuing benefits (DX 15, 19). 20 C.F.R. § 725.494(e).

The Director also argues that C.P.G. failed to prove that Dags Branch is a potentially liable operator. I am directed to evidence showing that the miner did not work for Dags Branch for a cumulative period of at least one year (DX 5, p.7; TR 15). 20 C.F.R. § 725.494(c). Moreover, C.P.G. failed to prove that Dags Branch is C.P.G.'s successor operator under the criteria set forth in § 725.492. Dags Branch did not acquire C.P.G.'s mine or mines. Rather, the C.P.G. mine "mined out" and some of the miners went to work for Dags Branch at a different location (TR 14,21-22). There is no proof that Dags Branch acquired substantially all of C.P.G.'s assets. Although Dags Branch may have used some of the equipment that had been used by C.P.G. (cf. DX 5, p. 9 with TR 24), there is no evidence that Dags Branch acquired "substantially all" of C.P.G.'s equipment, or even that the equipment properly would have been considered among C.P.G.'s assets. Finally, Dags Branch did not acquire C.P.G.'s coal mining business. Rather, C.P.G.'s two owners joined with a third individual, Danny Justice, to form Dags Branch. Danny Justice and only one of C.P.G.'s owners "wound up with Dags Branch" (TR 21).

Moreover, the Director argues that C.P.G. has failed to prove that Dags Branch is C.P.G.'s successor within the meaning of § 725.492. The record demonstrates only that the two companies had some common ownership. Moreover, the miner worked less than one year for Dags Branch. Thus, C.P.G. has failed to prove that Dags Branch is a potentially liable operator.

After a review of the evidence, I find that C.P.G. failed to prove that McCoy-Elkhorn is a potentially liable operator. I also find that McCoy-Elkhorn is not a potentially liable operator. The miner did not work for McCoy-Elkhorn for a cumulative period of at least one year (DX 5, p.5, DX 7, 13; TR 16). 20 C.F.R. § 725.494(c). Moreover, C.P.G. failed to prove that McCoy-Elkhorn is a successor operator to Johns Creek Elkhorn under the criteria set forth in § 725.492. Although the miner previously stated that he thought McCoy-Elkhorn "bought" Johns Creek Elkhorn at some point between the times he worked for the two companies (DX 5, pp16-17; DX 13), at the formal hearing he testified that it was Johns Creek Elkhorn that bought McCoy-Elkhorn (TR 26). He further testified that he does not know whether McCoy-Elkhorn owned Johns Creek Elkhorn (TR 26-27). In addition, the miner consistently stated that James River Coal Company owned McCoy-Elkhorn when he

worked there (DX 5; TR 26). It is as likely that James River bought both companies as it is that McCoy-Elkhorn bought Johns Creek Elkhorn.

I accept the Director's allegation that the miner's testimony is "simply insufficient to prove that McCoy-Elkhorn is Johns Creek Elkhorn's successor. C.P.G. did not establish an evidentiary foundation for the miner's asserted knowledge about the relationship between the two companies. Equally as important, the miner's testimony about the possible relationship was too tentative, speculative, uncertain and internally inconsistent to constitute proof that McCoy-Elkhorn is Johns Creek Elkhorn's successor."

Therefore, I find that the Employer, C.P.G. Inc., is the responsible operator.

#### MEDICAL EVIDENCE SUMMARY

##### X-rays

<u>Exhibit No.</u>	<u>Physician</u>	<u>BCR/BR</u>	<u>Date of film</u>	<u>Reading</u>
DX 10	Ranavaya	B	12/15/02	1,0
DX 11	Powell	B	11/03/04 <sup>4</sup>	Negative
EX 1	Wheeler	B/BCR	"	Negative
DX 12	Dahhan	B	4/18/05	Negative

##### Pulmonary function studies

Exhibit No.	Physician	Date of study	Tracings present?	Flow-volume test?	Broncho-dilator?	FEV1	FVC/ MVV	Coop. and Comp. Notes
DX 10	Hieronimus	2/3/03	Yes	Yes	No	2.50	3.75	Good
DX 11	Powell	11/3/04	Yes	Yes	No	2.93	3.99	good
DX 12	Dahhan	4/18/05	Yes	Yes	Yes	2.62 2.46	3.46 3.07	Poor

##### Blood gas studies

Exhibit No.	Physician	Date of Study	Altitude	Resting (R) Exercise (E)	PCO2	PO2	Comments
DX 11	Powell	11/3/04	0-2999	R	39.1	91.7	
DX 12	Dahhan	4/18/05	"	R	37.8	83.3	

#### Medical Reports

*Charles J. Hieronimus, M.D.*

Dr. Hieronimus, a family practitioner, performed a pulmonary evaluation at the request of Claimant's attorney on February 3, 2003. DX-10. He took a history of 26 years of coal mining employment with 18 of those years spent underground. Claimant is a nonsmoker. Physical examination revealed expiratory wheezing and clubbing of the nail beds. Pulmonary testing revealed a decreased FVC and FEV1. He diagnosed restrictive pulmonary disease, COPD, and small airway disease. He found that these conditions were the result of coal mine employment

<sup>4</sup> This is the Department of Labor examination.

and found that he is totally disabled from returning to work in a dusty environment. He recommended that Claimant have no further coal dust exposure.

*Robert W. Powell, M.D.*

Dr. Powell, board certified in internal and pulmonary medicine and a B-reader, performed the field examination on November 3, 2004. DX 11. He noted no smoking history. He interpreted a chest x-ray as negative for pneumoconiosis. The spirometry revealed a mild reduction in ventilation. Arterial blood gases were normal. Dr. Powell diagnosed a very mild reduction in ventilation with an unknown etiology. He stated that the impairment would not impair Claimant's abilities to perform his previous coal mining employment.

*Abdul K. Dahhan, M.D.*

Dr. Abdul K. Dahhan, a B-reader and board-certified pulmonary specialist, performed a pulmonary disability evaluation on April 18, 2005. DX- 12. Dr. Dahhan noted a history of 27 years of underground coal mining. The claimant is a nonsmoker. Physical examination of the chest showed good air entry to both lungs with no crepitation, rhonchi or wheeze. Examination of the extremities showed no clubbing or edema. Electrocardiogram showed regular sinus rhythm with non-specific ST changes. Spirometry was invalid due to poor effort, but revealed indicated adequate respiratory capacity with no evidence of restrictive ventilatory impairment. Arterial blood gases at rest show normal values. He interpreted a quality one chest x-ray as negative for pneumoconiosis. Dr. Dahhan found no evidence of pneumoconiosis and no evidence of a pulmonary impairment. He further found that Claimant retains the respiratory capacity to return to his previous coal mining employment.

## **FINDINGS OF FACT**

### ***Pneumoconiosis***

#### **Existence of Pneumoconiosis**

Pneumoconiosis is defined as a chronic dust disease arising out of coal mine employment.<sup>5</sup> The regulatory definitions include both clinical (medical) pneumoconiosis, defined as diseases recognized by the medical community as pneumoconiosis, and legal pneumoconiosis, defined as any chronic lung disease. . arising out of coal mine employment.<sup>6</sup> The regulation further indicates that a lung disease arising out of coal mine employment includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. § 718.201(b). As several courts have noted, the legal definition of pneumoconiosis is much broader than medical pneumoconiosis. *Kline v. Director, OWCP*, 877 F.2d 1175 (3d Cir. 1989).

A living miner can demonstrate the presence of pneumoconiosis by: (1) chest x-rays interpreted as positive for the disease (§ 718.202(a)(1)); or (2) biopsy report (§ 718.202(a)(2)); or the presumptions described in Sections 718.304, 718.305, or 718.306, if found to be applicable; or (4) a reasoned medical opinion which concluded the disease is present, if the opinion is based on objective medical evidence such as blood-gas studies, pulmonary function tests, physical examinations, and medical and work histories. (§ 718.202(a)(4)).

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<sup>5</sup> 20 C.F.R. § 718.201(a).

<sup>6</sup> 20 C.F.R. § 718.201(a)(1) and (2) (emphasis added).

### *X-ray Evidence*

The record I consider under the rules for limitations on evidence involves four readings of two x-rays. The Claimant relies on the one reading by Dr. Ranavaya, a B reader. DX 10. The other x-rays readings are negative.

The weight I must attribute to the x-rays submitted for evaluation with the current application is in dispute. “[W]here two or more X-ray reports are in conflict...consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays.” 718.202(a)(1). I am “not required to defer to...radiological experience or...status as a professor of radiology.” **Dempsey v. Sewell Coal Co.**, 23 BLR 1-47 (2004).

I note that of the readers of record, Dr. Wheeler is a dually qualified board certified radiologist B reader and is the best qualified.

I note that the preponderance of the readers do not find pneumoconiosis.

The Board has held that I am not required to defer to the numerical superiority of x-ray evidence, **Wilt v. Wolverine Mining Co.**, 14 B.L.R. 1-70 (1990), although it is within his or her discretion to do so, **Edmiston v. F & R Coal Co.**, 14 B.L.R. 1-65 (1990). See also **Schetroma v. Director, OWCP**, 18 B.L.R. 1- (1993) (use of numerical superiority upheld in weighing blood gas studies); **Tokaricik v. Consolidation Coal Co.**, 6 B.L.R. 1-666 (1984) (the judge properly assigned greater weight to the positive x-ray evidence of record, notwithstanding the fact that the majority of x-ray interpretations in the record, including all of the B-reader reports, were negative for existence of the disease). See also **Woodward v. Director, OWCP**, 991 F.2d 314 (6th Cir. 1993).

I also note that the most recent x-ray is negative. Because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from that evidence which is older. **Clark v. Karst-;Robbins Coal Co.**, 12 B.L.R. 1-;149 (1989)(en banc); **Casella v. Kaiser Steel Corp.**, 9 B.L.R. 1-;131 (1986).

In this case, the number of negative x-rays and expert opinion of the most qualified readers dictate a conclusion that pneumoconiosis has not been established by x-ray. This determination is substantiated by the fact that the most recent x-rays are negative.

### *Biopsy and Presumption*

Claimant has not established pneumoconiosis by the provisions of subsection 718.202(a)(2) since no biopsy evidence has been submitted into evidence. Other presumptions are not applicable.

### *Medical Reports*

20 C.F.R. § 718.202(a)(4) sets forth:

A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in Section 718.201. Any such finding shall be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

I find that as the x-ray evidence does not support a diagnosis of pneumoconiosis, clinical pneumoconiosis is not proven.

“Legal pneumoconiosis is a much broader category of disease” than medical pneumoconiosis, which is “a particular disease of the lung generally characterized by certain opacities appearing on a chest x-ray.” *Island Creek Coal Co. v. Compton*, 211 F.3d 203 at 210 (4<sup>th</sup> Cir. 2000). The burden is on the Claimant to prove that his coal-mine employment caused his lung disease. 20 C.F.R. § 718.201(a)(2). A disease “arising out of coal mine employment” is one that is significantly related to, or substantially aggravated by, coal dust exposure. 20 C.F.R. § 718.201(b). *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6<sup>th</sup> Cir. 2000).

I do not find the report or opinion of Dr. Hieronymus are helpful he did not set out his rationale for his diagnosis. He did note that the Claimant had wheezing and clubbing of the fingers but did not explain further. DX 10.

A 'reasoned' opinion is one in which the administrative law judge finds the underlying documentation and data adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). Whether a medical report is sufficiently documented and reasoned is for the judge as the finder-of-fact to decide. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

In reviewing whether Dr. Hieronymus submitted a well reasoned report, he did not even incorporate his testing or the x-ray read by Dr. Ranavaya by reference as a basis for his opinion. The spirometry notes a borderline restrictive defect and a mild obstructive effect. There are no reliable office notes or hospital records to substantiate the symptoms. There is no cogent explanation for the diagnosis. An unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp.*, 6 B.L.R. 1-1292 (1984). See also *Phillips v. Director, OWCP*, 768 F.2d 982 (8<sup>th</sup> Cir. 1985); *Smith v. Eastern Coal Co.*, 6 B.L.R. 1-1130 (1984); *Duke v. Director, OWCP*, 6 B.L.R. 1-673 (1983) (a report is properly discredited where the physician does not explain how underlying documentation supports his or her diagnosis); *Waxman v. Pittsburgh & Midway Coal Co.*, 4 B.L.R. 1-601 (1982).

The medical opinions must be reasoned and supported by objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. 20 C.F.R. §718.202(a)(4) (2001). I find that Dr. Hieronymus failed to submit a “reasoned medical opinion” that establishes that legal pneumoconiosis is established in this record.

### **CONCLUSION**

In summary, the Claimant has not established the presence of pneumoconiosis. I find that the Claimant has failed to establish a required element of proof. *Oggero v. Director, OWCP*, *supra*. As a result, because this is an initial claim, there is no need to evaluate the remainder of the issues. Therefore, his claim for benefits is denied.

### **ORDER**

It is ordered that the claim of **B.D.V.** for benefits under the Black Lung Benefits Act is hereby **DENIED**.

**A**

DANIEL F. SOLOMON  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** If you are dissatisfied with the decision, you may file an appeal with the Benefits Review Board (“Board”). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge’s decision is filed with the district director’s office. See 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. See 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. See 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).